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published in Vol. 1, page 735, *et seq.* of this journal. See also article by Robert Ferrari, "The Public Defender: The Complement of the District Attorney," published in Vol. 2, page 704 *et seq.* of this journal, also comments at pages 398 and 399, also reference to "Public Defenders Demanded in Cleveland."

For a very able review of the charter of Los Angeles county and also the charter of San Bernardino county, see article by Elmer I. Miller, vice-president and supervisor of history and political science at the State Normal School at Chico, California, published at pp. 411-419 of No. 3 of Vol. VII (issue of August, 1913) of *The American Political Science Review*.

The more patent and pressing individual iniquities of our system of private retainer of counsel and trial lawyer that go without any chance for justice may be largely eliminated by such "public defender," and the work which will be so done should receive very close study. It is a great step in advance but fails to reach, although pointing the way to, the heart of the great trouble. This development in county government may open the door to a fundamental reorganization of the bar throughout the state. It may be thus demonstrated that the efficiency of trial by court or jury, in both civil and criminal cases, as a means for ascertaining the law and the facts concerned, will be greatly increased by shutting out from the court procedure that marplot, the privately retained client care taker.

II.

AN OFFICIAL TRIAL BAR.

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We come now to the proposition, the consideration of which forms the second part of this symposium, viz.:

"That all trials in court should be conducted by members of a trial bar, holding public office under civil service system (including an efficiency bureau) and prohibited from accepting any private employment while holding such office."

Given a profession that is naturally conservative, even though specially charged with the protection of life, liberty and property, and which by surrounding circumstances and the general forces of society has become divided into two groups, one small in numbers but rich in all the gifts of brain and powerful largely through cohesion and exploitation, and the other overwhelmingly large in numbers but weak through dependence even to the point of practical starvation as the price of independence.

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Also given, back of this profession (itself already a house divided against itself), a people similarly divided.

Is it not plain that reorganization of the profession, noble and great as it has been, even though worthy of all the plaudits it has given itself at banquets beyond number, is the great and crying need of the temple of justice?

No matter what the glorious future of governmental agency may be, its judicial function so far has been merely a halting and partial substitute for war, and wherever it tends to increase and embitter strife it is probably fundamentally wrong in spirit or method rather than merely lacking in efficiency.

In the United States we have, by method and practice, maintained and developed the very type of waste and injustice from which the human race has been seeking to escape by judicial procedure. In fact, both the bar and their clients have become atavistic and have made our courts battlefields for the powerful and slaughterhouses for the weak.

Professor Roscoe Pound, in a paper read before the Chicago Law Club, December 3rd, 1909, points out that while "courts may do something to prevent such abuse of procedure" as has become characteristic of the American practice, "until the bar is so organized and those of its members who practice in the courts are so trained that lawyers have a deep sense of their obligations as officers of the court and ministers of justice, such time consuming and law defying proceedings will not wholly cease." Professor Pound does not hesitate to assert that the chief factor in developing the abuse of procedure has been, to use language of Dr. Wigmore in Section 21 of Volume I of his work on "Evidence," "the spirit of strenuous struggle and unrestrained persistence which drives the bar of our country to wage their contests to the extreme of technicality."

It has been said, and even by attorneys highly respected, that "the courts are wholly responsible." Courts are no more responsible for the condition concerned than attorneys, and courts and attorneys combined are no more responsible for that condition than clients. And courts and attorneys and clients combined are no more responsible for that condition than the people at large. Your highly respected workman and the man of big business both, when seeking an attorney, hunt for the man who brings in the goods, and neither would ordinarily dream of selecting an attorney who had the reputation of being the squarest man on the face of God's earth if he also had the reputation of losing cases that might by any possibility have been won. The men who condemn the courts most severely, and those who condemn the attorneys in like manner will themselves, nine times out of ten, gloss over the truth which

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tells against them, conceal facts from their attorneys when consulting with them, and chuckle over winning a case where they themselves at the bottom of their hearts know that the other fellow should have won, but failed because he had the poorest attorney.

We have developed the contentious theory of trials to a point where the expression, the "sporting theory of justice" is a very mild phrase with which to describe the real condition of affairs in a country where the entire bar glory in and but few see the defilement of the pledges of the national organic law that our government is designed to "establish justice," "promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

In the sacred name of "liberty" the people have allowed and fostered a "license" in themselves and their counsellors at law and their trial lawyers that has practically destroyed public confidence in the administration of justice.

We lawyers have gloried in what we have done, and we are just beginning to reap the harvest of contumely, the seeds of which we have planted with the aid of our clients. We have become money changers in the temple instead of the ministers of justice. We have sold ourselves, often to the highest bidders, and have gone to war as hired mercenaries instead of actually being what we pretend, officers of the court, and the court—the bench, recruited from the bar, can hardly be expected to rise much higher than such fallen and falling angels of justice.

It is a monument to courage, a monument to civic virtue, a monument to the highest ideals of life when a great lawyer today is a real servant of the public while subject to private employment. There are but few such, and we are breeding up young men to become more and more a mere body of Hessians, interwoven into a predatory commercial system.

Many lawyers might at first be so short sighted as to protest against such a change in system, but the legal profession itself could not pray for a brighter day than the one which would be so brought about for the benefit of the legal profession itself. No calling in life can really be successful except in so far as it is really useful. The present legal calling does not appeal to the average man as useful, and in so far as it is malodorous it is mainly because of the present method of securing and employing and bringing to bear upon the court the influences that must ever surround the hired fighter.

No greater egotism can be found than that of lawyers, covering themselves and their works with garlands of oratory on every available occasion. Yet even now a fear and trembling runneth through our ranks,

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and some of us at least begin to realize that we ought to sit in sackcloth and ashes and cry unclean, for as a rule the greatest among us have ceased to be freemen of the law and have become as merchandise, bought and sold according to the necessities of those who bid for our services under general retainers and otherwise, expecting us to go to their help in every way possible whenever the heavy hand of the law is laid upon them and they are brought to the bar of justice. Then it is that the great among us, with a multitude who pick up the crumbs from their tables, are expected to and do prove their ability often to twist awry if not to actually make away with both the law and the fact if need be.

We certainly cannot evade the fact which cries aloud to Heaven that the fundamental characteristic of our procedure, both civil and criminal, is that of a deadly battle in which victory is sought without much regard being paid to either law or fact except as weapons to be used to crush an adversary or to be dodged when swung against our clients, our clients who look to us in court to earn the real retainer (perchance paid to us as counsellors at law) to find the loopholes in the law rather than to build up and strengthen the law.

Our entire judicial system is upside down in one respect at least. No one should have the opportunity to bring into court his legal caretaker to fight for him as his trial lawyer. No man has any just need to choose his trial lawyer as the rich and powerful do now and the system has practically made justice in the land impossible, or a gambling chance.

Our present method of trying cases is hardly any improvement over the old method of trial by battle and has very little to commend it when compared therewith. It is either a battle or a game, and should be neither. The longest purse gets the ablest man, often so able that the battle or the game becomes a farce, and in any case that man knows his bread and butter depends upon his winning cases, even when to win for his client he knows is an injustice. We may well take the instances suggested by Spencer of how "our legal system holds out promises of immunity" to those who are at all inclined to wrong their fellow men. "Should his proposed victim be one of small means, there is the likelihood that he will not be able to carry on a lawsuit; here is encouragement. Should he possess enough money, why, even then, having, like most people, a great dread of litigation, he will probably bear his loss unresistingly; here is further encouragement. Lastly, our plotter remembers that, should his victim venture an action, judicial decisions are very much matters of accident, and the guilty are often rescued by clever counsel; here is still more encouragement. And so, all things

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considered, he determines to chance it. Now, he would never decide thus were legal protection efficient."

It is certainly true that legislation cannot create moral force, just as Spencer notes that "it is impossible for man to create force." But he can "alter the mode of its manifestation, its direction, its distribution." It is hardly commonsense to turn a bull into a china shop or a rattlesnake into a nursery. To permit any one to bring his hired man into court to try his case is equally absurd if truth and justice are really the objects of the trial.

In name we insist that an attorney at law, privately retained and compensated, is an officer of the court, stubbornly shutting our eyes to the fact that we thereby force a large majority of such so-called officers of the court to choose between starvation or aiding in the defeat of justice.

The function of the trial lawyer, in all cases, is fully as important to the public as that of the judge or the jurymen, and it should not be left to the longest purse to choose the ablest man at the bar to try a case against, perhaps, a poor man whose purse will not enable him to get anyone with more ability than a tyro at either the substantive or the remedial (adjective) law. Herbert Spencer plead, with surprising keenness of vision, for an "administration of law prompt, gratuitous, and certain," insisting that with such an administration of law "only in cases where both parties sincerely believed themselves right, would judicial arbitration be called for," and he did not hesitate to assert that the "number of such cases is comparatively small."

Supposing there be a controversy between the powerful and the weak, and the weak has just as good a chance to draw from the box the ablest trial lawyer as the powerful, there would not be one case go to trial where ten are now tried; there would not be one case tried where now hundreds are brought; and for every case that is now bluffed out and does not get into court nor reach settlement of any kind, there would be a very strong probability of a fair and amicable settlement, leaving peace instead of hate in its wake as at present.

It is doubtful whether there is any such difference between wrongs as will justify much, if any, of the differences which now exist between criminal and civil procedure. Certainly in both classes of trials, the first and absolutely necessary steps towards justice is to find the truth concerned, and in the effort to get at the truth everything which savors of combat is liable to cloud the truth and at least should not be favored. With a strange perversity we have (ignoring this fundamental principle) given over the real and vital control of all procedure to passion, prejudice, craft, subtlety, and warring self-interests. No scientific

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quest calls for more dispassionate and unselfish means than the quest for truth with respect to wrongs between fellowmen. Nevertheless, hugging self-deception to our hearts, we have persistently made the court a prize fight ring where litigants do and often must (with such hired retainers as they can command, and some without any real aid and none or but very few fairly matched) butcher their way through, with deceit and evasion, and every conceivable kind of injustice, to a "judgment" that is often a greater catastrophe, in criminal law at least, than the original wrong, while, at least a very heavy portion of the cost is borne, in both civil and criminal cases, by those who have no direct relations to the controversy or the litigants.

Leaving litigants to choose their own trial attorneys, and pay them as they can, has led to a system of handling legal business that is vicious in every respect. Take one phase of it, for example, a few leaders of the bar are overcrowded with business and every one who can afford to employ such a leader of the bar will do so, and these leaders of the bar must accommodate each other in matters of time, and hence interminable delays.

In the meanwhile a large number of others who might fully, fairly and with probably equally good success, from the point of view of what is right and just, try cases, are left with very little, if any, business. These leaders of the bar build up around themselves an office management to which they leave a large portion of their business, and in turn require results from those within their office management with very little consideration as to methods pursued. The struggle becomes very bitter by the large number of incoming members of the bar to secure a footing, either in connection with such leading office or independently, and methods again must yield to the getting of results. If litigants were left to their own freedom as to employing counselors-at-law, but did not have any such freedom as to employing trial lawyers a very different situation would arise. But, of course, that requires that trial lawyers shall in reality, and not in mere name, be officers of the court, be paid a public salary, be limited in number, and charged with and held to as strict accountability as the judges themselves.

There is ample ground for the belief that the greatest cause of all, today, in the miscarriage of justice is the privilege on the part of the powerful to retain whom they please for trial lawyers, and the inability upon the part of the weak and the poor, and especially the friendless to get anything like adequate legal representation in court in the trial of cases, but the matter is almost as bad when two giants come into court with their retainers and legal advisers and counsel and assistants, and engage in a private battle that absorbs the entire time of the court and

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the legal machinery for weeks and months if not years, and often to a large extent in mere legal skirmishing for position or for some purely technical advantage, when both sides are afraid of the truth and are equally struggling to becloud the issues and tangle the proceedings.

We complain when great enterprises are permitted to secure hordes of armed men to fight for them, but we shut our eyes when the same interests are allowed to procure hordes of court retainers to fight for them, including, it may be in some cases, the judge upon the bench.

It has been freely charged that great leaders at the bar desire to see certain men put upon the bench. Certainly it is not to the interest of their clients to secure for the bench the greatest of judges and the most fearless, is it? And certainly as matters now stand the poor man has little show in court even though the judges wish to do what is right.

The system suggested would quickly tend to reduce the number of such cases and the number of trial lawyers necessary. Such trial lawyers might well be obtained through civil service methods, including an adequate efficiency bureau. At least the vast number of civil cases might be far better so tried by such men of fair average ability than in any other way. In the few specially difficult cases the counselors at law could furnish such trial lawyers all the special help needed without interfering with the procedure. Of course, there should be some specified grounds for absolute rejection by a client of a trial lawyer so drawn from the box, and there should be at least one or more peremptory rejections allowed. But if it is known that when any one comes into court or is dragged into court that he can have and that he must take an average lawyer drawn from the box, and that lawyer is not dependent upon his favor nor upon the winning of that case for his future, one can readily see how radical the change would be in the present practice of the law and the elimination from the present practice of many of its most disreputable and, under the present method of procedure, most incurable phases.

There would be rebuilt a confidence in the court and in the procedure of the court.

Such a trial bar would quickly raise the character and quality of the bench. They could well be fearless of the bench and in turn again no judge need be dependent upon the favor of any trial lawyer or lawyers. The counselors-at-law could not, even if they would, contaminate the court by any improper methods. Their success would be dependent upon getting at the facts and the law and advising their clients in accordance therewith, and the success of their clients in all litigation would be dependent upon getting such fair advice and following it.

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As it is now, the abler the lawyer, as a rule, the more the court is afraid of him, the less the jury trusts him, the more determined is the feeling from the beginning to the end of the controversy, whether it be weeks or years, that such able lawyer is befogging the case; that he is holding back and concealing the truth; that he is pulling the wool over the eyes of the judge and of the jury; that he is distorting the facts; that he is misleading or bullyragging the witnesses; and the thousand and one things that necessarily flow from the actual fact that he is a paid and hired fighter and that even the best traditions of the law can hardly be more than a mere skin or varnish which can be easily scratched and show the Tarter underneath.

The average client knows what he expects from his own lawyer—everything and anything to win the case, and yet when that lawyer is not his own lawyer he blames him for doing the very things which he expects him to do when hired by him as his own paid fighter. If, instead of that he must take an officer of the court who is not dependent upon his favor nor upon his pay, he will respect that lawyer and when that trial lawyer tells him what should be done he will do it. And the jury will listen with respect to such a trial lawyer so drawn, so picked, so selected and so sustained, and taken out of the field of the mere hired Hessian and placed in the field of public service in an honest effort to ascertain the truth and deal fairly between those who must come into court to settle their controversies. To such a trial lawyer the judge will yield consideration and will be free from a feeling of continual fear that he is being entrapped in his rulings. And the judgments of the court reached with the aid of such contesting trial lawyers will stand the test of time and afterthought as present judgments do not and can not. Precedents would then become well worth while to follow, and not to be whittled at and cut down or even as at present often jeered at.

No cases would go into court, or but very few, except those which require the aid in truth and in reality of a tribunal so constructed to get at and ascertain what was fair and right either as to the facts or law or both. Most cases would be ended by a swift and simple trial and new trials and appeals would be rare.

As to ways and means for providing a body of trial lawyers who shall be officers, and who shall not be subject to private employment at all any more than the judge on the bench, the problem could be solved if it was once realized how needful such assistance was in place of the present wretched method of private employment of those who must really after all control the conduct of cases from beginning to end.

Even with the present flood of litigation it would not take a very exhaustive investigation to determine with a fair degree of accuracy how

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many trial lawyers would be necessary in any city or county, or in a district containing several counties. Under the home rule principle, such method must first be tried out in one or more cities or counties, but this would probably require amendments to state constitutions.

So far as varying compensation for trial lawyers doing either *nisi prius* or appellate work might be needful or proper, it could be easily arranged as it is now for judges, but the enormous rewards on the one hand and the penury on the other now existing would have no place in such system and there would be no greater need for difference in salaries of members of the trial bar than of judges. It would probably be well to allow at least some, and perhaps a very wide discretion to the court to tax attorneys' fees as costs, to be paid by either or both parties to the state, county or city.

What valid argument can there be for privately retained trial lawyers unless there be substantial inability to secure such official trial lawyers sociologically and scientifically fitted to aid in ascertaining the truth involved in the trial of cases, whether civil or criminal? It may be that the state could go farther and, by a bureau of justice, and through public officials, better provide all legal services than through privately retained client care-takers. Whether that be so or not, it is submitted that the client care-taker should no longer be permitted to try his clients' cases, in either civil or criminal matters.

There is a contempt of law (because it does not secure "justice") spreading abroad, and deepening in the land, and it threatens the overthrow of free institutions.

Our method of requiring or permitting litigants to hire legal prize fighters to try cases has inevitably made it impossible, with human nature as it is under existing circumstances, for either bench or bar to do much, if any better than they have done. Codes of ethics and tinkering with details of practice will not rescue the realm of jurisprudence from the prostitution into which it has been plunged.

Neither is it reasonable to expect that we can get a bench which can and will lift the bar, the clients and the practice out of this abyss. We must go to the bottom and build up, taking at least the entire court work out of the control of the pocket book.